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IN THE

Supreme Court of the United States.

October Term, 1954.

No.

COMMONWEALTH OF PENNSYLVANIA EX REL. PATRICIA ANN KUNTZ, A MINOR,

v.

ROBERT J. STACKHOUSE AND IRENE STACKHOUSE, HIS WIFE.

PETITION FOR CERTIORARI.

OPINIONS BELOW.

The opinion of the Superior Court of Pennsylvania is reported at 176 Pa. Superior Ct. 361, — A. 2d —. The opinion of the Court of Common Pleas of Delaware County is unreported. The memorandum opinion of Supreme Court of Pennsylvania sur denial of Petition for Reconsideration of Petition for Allowance of Appeal is unreported. Copies are appended.

JURISDICTIONAL STATEMENT.

A Final Order of the Supreme Court of Pennsylvania was entered on November 1, 1954 denying petitioner's Petition for Allowance of Appeal to that Court from the Superior Court of Pennsylvania. A Final Order of the Supreme Court of Pennsylvania refusing reconsideration was entered on November 23, 1954.

Jurisdiction to review the above mentioned Orders is conferred upon this Court by the Act of June 25, 1948, c. 646, 62 Stat. 929 (28 U. S. C. A. § 1257).

QUESTIONS PRESENTED.

1. May a State court, consistently with the freedom of religion granted by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, grant custody of a two-year-old child, after the death of its parents, to persons who intend to raise that child in a religion different from that of its parents and that in which the child has been baptized, where the child's nearest of kin is acknowledged by the said court to be an equally fit custodian and the said nearest of kin is of the same religion as the child and its parents and desires to have custody of the child and to raise the child in its own religion.

2. Did the Pennsylvania Courts, in denying petitioner custody of her grandchild, apply the proper Constitutional standard in disregarding the religious preference of the child's parents?

CONSTITUTIONAL PROVISION INVOLVED.

Amendment XIV to the Constitution of the United States, Section 1, in pertinent part as follows:

> ". . . nor shall any State deprive any person of life, liberty or property without due process of law; . ."

STATEMENT OF THE CASE.

The child involved in this proceeding, Patricia Ann Kuntz, was born August 22, 1952 in Grand Haven, Michigan. She lived in that town with her parents in the home of her paternal grandmother (petitioner herein) until April 10, 1953, at which time her parents were killed by an insane neighbor.

Patricia Ann was immediately taken in by her relatives who lived nearby and remained with them for approximately a week, at which time a local Probate Judge, without the slightest authority under the law of Michigan, removed the child from her home, placed her in a foster home, prohibited her relatives from visiting her for about six weeks and finally, on July 6, 1953, granted custody of the child to the Respondents (a maternal aunt of the child and her husband), without any notice to the relatives and without any hearing as required by the law of that State. This action of the Michigan Judge was promptly declared void by the Appellate Court of that State. In the interim, however, Respondents had removed the child to Delaware County, Pennsylvania. Petitioner thereupon filed her Petition for Habeas Corpus to obtain custody of the child in the Court of Common Pleas of Delaware County, Pennsylvania, at November Term, 1953, No. 229. After extensive hearings and argument petitioner was granted custody of her grandchild on March 11, 1954.

Respondents appealed to the Superior Court of Pennsylvania, which, on September 28, 1954, reversed the decision of the Court of Common Pleas and awarded custody of the child to the Respondents notwithstanding petitioner's urging of the Question Presented in this Petition.

Petitioner immediately filed her Petition for Allowance of Appeal in the Supreme Court of Pennsylvania alleging, inter alia, the error alleged in this Petition. That Court on November 1, 1954 denied the said Petition without Opinion.

Thereafter, petitioner filed a Petition for Reconsideration of the Petition for Allowance of Appeal which was denied by the Supreme Court on November 23, 1954. A copy of the Memorandum Opinion of that Court is attached to this Petition.

The Federal question stated in this Petition was raised in the Courts Below in the following manner:

In the Court of Common Pleas of Delaware County, Pennsylvania, petitioner introduced evidence proving the difference of religion between the parties as alleged in this Petition. These facts are not controverted. There being no jury in such proceedings, the requests for decision of both parties were placed before the Court in briefs. The following quotation from petitioner's brief in that Court illustrates the manner in which this question was there urged.

> "Not only the law of Pennsylvania but the Constitution of the United States recognizes the indefeasible right of parents to choose the religion in which their children shall be raised.
>
> 'The child is not the mere creature of the State; *those who nurture him and direct his destiny have the right,* coupled with the high duty to recognize and prepare him for additional obligations.'
>
> *Pierce v. Society of Sisters,* 268 U. S. 510."
>
> • • •
>
> "For these reasons, petitioners submit that the respect for the rights of parents to choose the religion of their children enjoined upon the Court by the public policy of Pennsylvania and the Constitution of the United States prohibits the award of custody to respondents who have sworn before this court that they intend to rear this child in a religion different from that of her parents. This is not simply another 'factor' to be considered in determining what is for the best interests of the child. In this case, petitioner submits, it is the controlling factor."

The holding of the Court of Common Pleas on this issue is thus stated in its Opinion of March 11, 1954:

> "To summarize, it appears from all of the evidence that with respect to the factors we have considered the conditions are about equal as to the petitioner and the respondents. This narrows our consideration to two remaining questions of the differences between the petitioner and the respondents, to wit, relationship and religion."
>
> • • •
>
> "As to religion, we realize there is no law which requires us to award custody to a person of the same religious persuasion as the child. However, the Juvenile Court Law and the new Adoption Law carry specific provisions as to this question. We feel that the same law should be followed in custody cases. Here, Patricia was baptized in the Roman Catholic religion. Her father and mother, as well as her grandmother, are Roman Catholics. The Stackhouses are Presbyterians and state that it is their intention to raise this child in that faith."

In the Superior Court of Pennsylvania petitioner was in the position of Appellee and therefore filed no Assignments of Error. Instead, petitioner pressed the issue of religion in her brief in that Court in substantially identical language to that quoted above from her brief in the Court of Common Pleas.

The Opinion of the Superior Court disposes of that question as follows: (176 Pa. Superior Ct. at pp. 365, 366)

> "The learned trial judge, having found moral fitness and material advantages of both homes in equilibrium, based his decision on religion and relationship. While correctly recognizing that no statute requires that a child's custody be given to one of the same religious creed as that in which the parents baptized the child he nevertheless found the requirement of the

Adoption Law applicable by analogy, and awarded custody to the grandmother on the basis of such analogy. We think this was error.

"Appellee and appellants are of different religious persuasions. Both produced their respective pastors as witnesses to attest to their activity and interest in church affairs. Appellee is an active church worker and appellants, while not as regular in their own church attendance as prior to the time when they had three children to care for, have nonetheless seen to it that their children receive religious training and at the time of the hearings their eldest child had a perfect attendance record there.

"We have no concern with committing the child to any particular creed or denomination. Our sole concern is that the home to which we assign it shall provide proper spiritual and material benefits and blessings.

"Quite recently (July 13, 1954) we have had occasion to review this problem in *Com. ex rel. Donie v. Ferree,* 175 Pa. Superior Ct. 586, 106 A. 2d 681. In fairness to the learned court below, the *Donie* case had not been decided when its decree in the present case was made. In the *Donie* case the writ issued at the instance of the paternal grandmother and was directed against foster parents in whose home the mother had placed the child and who had been caring for it for approximately three years. The parties were of different religious faiths. The lower court awarded custody to the grandmother which we reversed on appeal. Speaking through Judge WRIGHT, we stated at pages 590-591: "This [meaning religion] is not a determining factor: Commonwealth ex rel. Kelley v. Kelley, 83 Pa. Superior Ct. 17. Religion is an important matter and should be given consideration, but it does not determine the right to custody: Oelberman Adoption

Case, 167 Pa. Superior Ct. 407, 74 A. 2d 790. As was said by President Judge RHODES in that case, 'Unquestionably, the child will be given religious training by respondents, and its home will not be devoid of a religious atmosphere.' And see Commonwealth ex rel. Burke v. Birch, 169 Pa. Superior Ct. 537, 83 A. 2d 426."

In the Supreme Court of Pennsylvania petitioner urged the issue in her Petition for Allowance of Appeal as follows:

"4. (a) Where, as between two parties contending for custody of a child, one of them has the same religion as the parents of the child and intends to raise the child in that religion, and the other is of a different religion from the child's parents and intends to raise the child in that religion, may a Court award custody to the latter; especially where, as the Court found, 'both Appellee and Appellants are fit persons to have custody' and agreed with the Court of Common Pleas which 'found moral fitness and material advantages of both homes in equilibrium'. (Quoted matter from Opinion of Superior Court No. 315, pages 3-4)?"

"5. (a) (3) The decision of the Superior Court violates the natural right of parents to decide the religion of their children, a right granted them by the Constitutions of this Commonwealth and the United States, and is at variance with the decision of the Supreme Court of the United States in the case of *Pierce v. Society of Sisters*, 268 U. S. 510, because this decision of the Superior Court holds that the State has the power to change the religion of a child after its parents have expressed their judgment in that matter."

That Petition was denied without opinion.

In her Petition for Reconsideration in the Supreme Court of Pennsylvania the issue is urged in the same lan-

guage and was disposed of by that Court in its Memorandum Opinion of November 23, 1954, as follows:

> "In custody cases, by analogy to the policy thus enunciated in those statutes, the principle is established that the religious faith of the child's parents must be given *very serious consideration* in the placing of the child, nor have we any intention of departing from that principle.
>
> Under the facts of the present case, however, the Superior Court, which is vested with jurisdiction in such matters, determined that a paramount and imperative regard for the welfare of the child required that it be removed from the locality where its parents were murdered. Finding in this exercise of its judgment no violation of the principle above stated we refused the petition for the allowance of an appeal."

ARGUMENT.

The issue presented by this Petition is fundamentally the same as that stated by Mr. Justice Rutledge for this Court in *Prince v. Mass.*, 321 U. S. 158, 164, as follows:

> "Thus, two claimed liberties are at stake. One is the parent's, to bring up the child in the way he should go, which for appellant means to teach him the tenets and the practices of their faith. The other freedom is the child's, to observe these. . . .
>
> "To make accommodation between these freedoms and an exercise of state authority always is delicate. . . .
>
> "The rights of children to exercise their religion, and of parents to give them religious training and to encourage them in the practice of religious belief, as against preponderant sentiment and assertion of state power voicing it, have had recognition here, most recently in West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178. Previously in Pierce v. Society of Sisters, 268 U. S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A. L. R. 468, this Court had sustained the parent's authority to provide religious with secular schooling, and the child's right to receive it, as against the state's requirement of attendance at public schools. And in Meyer v. Nebraska, 262 U. S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A. L. R. 1446, children's rights to receive teaching in languages other than the nation's common tongue were guarded against the state's encroachment. It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. Pierce v. Society of Sisters, supra. And it is in recognition of this that these deci-

sions have respected the private realm of family life which the state cannot enter."

The criterion upon which this issue is to be resolved is outlined in this Court's decision in *West Virginia State Board of Educaton v. Barnette,* 319 U. S. 624, 639:

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

Petitioner believes that the description of the issue and the criterion for its resolution amply demonstrate the vital public importance of the question involved in this case and should provide sufficient reason for review by this Court. Petitioner believes, furthermore, that the decisions of the courts of Pennsylvania in this case are clearly inconsistent with prior decisions of this Court. For instance,

the holding of this Court in *Meyer v. Nebraska,* 262 U. S. 390, that a State could not consistently with the Fourteenth Amendment infringe the right of parents in respect of a particular phase of the education of their children as well as the similar holding of this Court in *Pierce v. Society of Sisters,* 268 U. S. 510, are plainly at war with the decisions of the Pennsylvania courts in this matter.

The more recent decisions of this Court in *Everson v. Board of Education of Ewing Township,* 330 U. S. 1; *McCollum v. Board of Education of Champaign County, Illinois,* 333 U. S. 203; and *Zorach v. Clauson,* 343 U. S. 306, even more clearly uphold the ground of this Petition. As stated by this Court in the case last cited (p. 314):

> "The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction."

The issue which Petitioner raises is thus narrowed to the very simple proposition that the parents of a child have the right to decide what religion that child shall be reared in and the child has the right to the benefit of that judgment by its parents not subject to interference by the State, at least, without compelling reasons.

And certainly any such State interference as might constitutionally be permitted between parent and child on the issue of religion could not be permitted on the basis of a vague and ill-defined power to determine "the best interests and welfare of the child".

Not only have the Courts of Pennsylvania erroneously rejected petitioner's demand for respect for the religious preference of parents of the child; their opinions plainly demonstrate that they do not even regard the matter as one of constitutional right. Even if, under some circumstances, a state might be free to award custody of a child to persons

of a religion other than its parents', the circumstances which warrant such an award must outweigh the rights of parent and child *viewed in the light of their First Amendment origin.* The Pennsylvania Courts have entirely neglected to consider the constitutional proportions of the right to freedom of religion, which demand, at a minimum, that the state may change the religion of a child only in compelling circumstances and with full recognition of the sacredness of the matter with which they tamper.

Besides the reasons mentioned above: (1) The inherent importance of the First Amendment issue to the public and to religious denominations in particular; and (2) The patent inconsistency between the decision of the court below and those of this Court; there exists a further special reason for the allowance of a petition for certiorari in this case.

There is now pending before this Court a Petition for Certiorari in the case of *Rouben Goldman and Sylvia Goldman, Petitioners v. John M. Fogarty, Guardian ad Litem.* That Petition, seeking certiorari to a judgment of the Supreme Judicial Court of Massachusetts, — Mass. —; 121 N. E. 2d 843, raises a question closely allied to the issue in the present petition and upon which issue it appears that the decision of the Supreme Judicial Court of Massachusetts presents an embarrassing conflict with that of the courts of Pennsylvania. Petitioner herein believes that her position as regards the application of First Amendment rights to cases involving custody of children is generally the same as that of the petitioner in the *Goldman* case, *supra.* For in that case the Supreme Judicial Court of Massachusetts held that notwithstanding the consent of the natural parent, a court could not award custody of a child to persons of a different religious faith from that of the parents of the child whereas in the present case the courts of Pennsylvania have held that notwithstanding the *absence* of such consent from the parents of the child and contrary to their desires as expressed during their lifetime

a court might nevertheless award custody of a child to persons of a different religious faith from that of the parents. (cf. Memorandum of Frankfurter, J., on application for extension of time within which to file Petition for Certiorari, Dec. 20, 1954; 75 Sup. Ct. (Adv. Rep.) 257)

For the foregoing reasons, petitioner respectfully requests that the Court grant the petition for Certiorari in the above-entitled cause.

JOHN ROGERS CARROLL,
THOMAS D. MCBRIDE,
2015 Land Title Bldg.,
Philadelphia, Pa.,
Attorneys for Petitioner.

OPINION AND DECREE OF COURT OF COMMON PLEAS, DELAWARE COUNTY.

This is a proceeding to determine the custody of Patricia Ann Kuntz, born August 22nd, 1952. She is presently residing with Robert J. Stackhouse and Irene Stackhouse, his wife, at 3532 Tyson Road, Newtown Square, Delaware County.

In such a case our primary and ultimate concern is to ascertain what will be for the best interest, welfare and happiness of the child who is the subject of the litigation. In order to approach the solution of this involved and difficult problem, we believe it will be helpful to have a chronological outline of the facts and circumstances leading up to the securing of the child by the respondents, Mr. and Mrs. Stackhouse. The evidence presented at the several hearings before the court discloses the following:

1. This child (eight months old) was living with her parents, Andrew and Ethel Kuntz, and her paternal grandmother, Elizabeth Kuntz, (now Kovacs), the petitioner in this case, on a farm on the outskirts of Grand Haven, Michigan.

2. On April 10, 1953, during the absence of the grandmother on a visit to Ohio, both of the parents of the child were murdered; and the child was removed by the sheriff of Ottawa County, Michigan, to a house across the road, being the home of Mr. and Mrs. Peter J. Kyers. These parties are the parents of the wife of Frank J. Kuntz, the latter being the elder brother of the child's deceased father.

3. On April 14, 1954 [sic] Frank J. Kuntz, the child's paternal uncle, took the child to his home. This was on the same day as the funeral of the parents of the child.

4. On the said 14th of April, Mr. and Mrs. Robert J. Stackhouse, having gone to Grand Haven, Michigan, attend-

ing the funeral services, Mrs. Stackhouse being a sister of the child's deceased mother, visited Judge Frederick T. Miles, Probate Judge of Ottawa County, Michigan, in his chambers. They expressed to the judge their desire to have the custody of Patricia. They did not make known to the paternal grandmother (the petitioner) or to any member of the Kuntz family the fact of this visit, or mention to them the fact of their desire to have Patricia.

5. On April 15, 1953, Mrs. Ruth van Duren, County Agent of the Probate Court for the County of Ottawa, Juvenile Division, presented her petition to the Court, stating that Patricia Ann Kuntz had become an orphan and dependent by reason of the murder of her parents, that her nearest kin and guardian are Mr. and Mrs. Alex Essenyi, maternal grandparents, and Mrs. Elizabeth Kuntz, paternal grandmother, and praying the Juvenile Court to take jurisdiction of the child. On the same date, Judge Miles signed an order which read: "A preliminary inquiry having been made from which it appears that the interest of the public and said child require that formal jurisdiction be acquired by this Court, therefore the filing of the foregoing petition is hereby authorized."

6. On April 17, 1953, Mrs. van Duren appeared at the home of Frank Kuntz and took the child, saying that the child was to be placed in a foster home and could not remain in the home of any member of the family. Thereafter, until Mother's Day, May 10, 1953, the Kuntz family did not know where the child was; frequent requests were made of the Judge by Frank Kuntz and Elizabeth Kuntz to find the whereabouts of the child but the Judge refused their requests.

7. On May 10, 1953, Mother's Day, permission was granted to Elizabeth Kuntz to see Patricia in the home of the foster parent, one Mrs. Buitenwert, a stranger to the parties, and to see her once a week thereafter.

8. On June 15, 1953, Elizabeth Kuntz married Louis Kovacs; on the wedding day the Kovacs went to the Judge and requested him to hold proceedings until their return from the honeymoon. Here there is a dispute in the testimony, the Kovacs say he told them not to worry, that he would do nothing without a hearing; the Judge says he told them that he was going to give the child to younger people who lived out of the state, that was better for the child. The Judge had already written to The Child Care Service of The Delaware County Institution District requesting an investigation and report on the Stackhouses.

9. On July 6, 1953, without a hearing, and without notice to the grandmother or other members of the child's family, Judge Miles handed down the following decree:

> "At a session of said court, held at the Probate Office in the City of Grand Haven, in said County, on the 6th day of July A. D. 1953.
>
> "Present, Hon. Frederick T. Miles, Judge of Probate.
>
> "In the matter of Patricia Ann Kuntz.
>
> "It is ordered that the petition filed by Ruth van Doren in the Ottawa County Probate Court alleging dependency of the above named Patricia Ann Kutrz be and hereby is dismissed.
>
> "It is further Ordered that Mr. and Mrs. Robert Stackhouse of 120 First Avenue, Broomall, Pennsylvania shall be and hereby are granted custody of the person of the above named child. This custody has been granted after a complete and official investigation by The Child Care Service of the Department of Welfare of the Commonwealth of Pennsylvania U. S. A. This custody will allow Mr. and Mrs. Robert Stackhouse to take and transport Patricia Ann Kuntz from Grand Haven, Michigan to their home in Broomall, Pennsylvania.

"It now appears that custody of this child by Mr. and Mrs. Robert Stackhouse will be the best plan to insure the child's welfare and security. Therefore the Ottawa County Probate Court of Grand Haven, Michigan, agrees that the child shall remain under the supervision of the State of Pennsylvania Child Care Service for supervision and future adoption by Mr. and Mrs. Robert Stackhouse, should the Commonwealth of Pennsylvania find such an adoptive placement advisable."

10. Immediately thereafter, and without the knowledge of the child's grandmother, Mr. and Mrs. Stackhouse were notified to come and get the child. They did so, and secured Patricia from Mrs. van Duren, who had taken her from the foster home, and they brought the child back with them to their home in Delaware County.

11. When Mrs. Kovacs learned what had taken place she retained an attorney and an appeal was taken from the order of Judge Miles to the Circuit for the County of Ottawa, State of Michigan.

12. On October 21, 1953, the following order was handed down by the Hon. Raymond L. Smith, Judge of that court.

"This matter having been brought on to be heard on the appeal by Elizabeth Kovacs from an order entered by the Probate Court for the County of Ottawa, State of Michigan, by which order the said Probate Court awarded the custody of said minor child to Mr. and Mrs. Robert Stackhouse, and it appearing that notice of such appeal has been duly served on the parties in interest and as ordered by the said Probate Court and in accordance with the statutes in such case made and provided, and James Bussard prosecuting attorney for the County of Ottawa having appeared for and on behalf of said minor child, and after hearing

argument by the respective attorneys for the parties in interest and the Court being advised in the premises, the Court doth find that said appeal is well taken and that the Probate Court for the County of Ottawa exceeded the jurisdiction of the Court in entering such an order and the Court doth find that said Probate Court failed to properly follow the statutes in making disposition of said matter and that said Probate Court had no authority to proceed and enter the order of disposition which was entered in said cause, in the manner in which said court did proceed.

"On motion of Harvey L. Scholten, attorney for Elizabeth Kovacs, the party appealing from said order, it is ordered and adjudged and this Court, by virtue of the authority therein vested doth order and adjudge, that the order entered in the above entitled matter, by which order the custody of said minor child was awarded to Mr. and Mrs. Robert Stackhouse, by the Probate Court for the County of Ottawa on July 6, 1953, be and the same is hereby vacated, set aside and held for nought. It is further ordered that said Probate Court order be and the same is hereby nullified and shall have no force or effect whatsoever.

"It is further ordered and adjudged that the Probate Court for the County of Ottawa erred in entering said order on July 6, 1953, in the above entitled cause and that such order be and the same is hereby set aside, reversed and nullified.

"It is further ordered and adjudged that said Probate Court may, if it acquired proper jurisdiction, take such further proceedings in the above entitled matter as are permitted by law."

13. On November 25, 1953, pursuant to a petition filed by Mrs. Kovacs, the writ of habeas corpus issued in this matter, and on December 28, and 29, 1953, and January 7,

1954, hearings were had in this court (before van Roden, P. J. Orphans' Court, Specially Presiding).

14. Between the dates of the second and third hearings Mrs. Sadie Kaplan, Official Investigator for the Orphans' Court of Delaware County, visited Grand Haven, Michigan, to investigate the home and surrounding living conditions of Mrs. Kovacs.

The problem confronting the court is not to determine whether the paternal grandmother or the maternal aunt and her husband shall be the successful contestants in this litigation. Rather, we are concerned for the best interests, welfare and happiness of Patricia Kuntz, who is now about 19 months old.

There is practically no conflict or dispute respecting the pertinent evidence produced by the petitioner and the respondents. The hearing judge (van Roden, P. J.) has had the benefit of observing and hearing the witnesses who testified, and he with the President Judge of the Court of Common Pleas (Sweney, P. J.) have the benefit of having heard the exceptionally able arguments of counsel for the parties before them as the court en banc. They have also examined and carefully considered the transcript of the notes of testimony taken at the hearings in the case.

Careful consideration of the evidence in this case, aided by the arguments of counsel and the briefs submitted by them, discloses the following:

a. Relatively, there is little or no difference respecting the home environment of the parties. Each has the proper and necessary accommodations, sufficient play space, accessible church and school facilities. Financially, the grandmother would seem to be some degree better off than the maternal aunt and her husband, but not to an extent which would make any serious difference. We note that the grandmother has recently married and we cannot tell, of course, how this marriage will fare; however, we also note that Mr. Stackhouse has a $10,000. mortgage on his home,

has just embarked on a new business and we cannot foresee how he will fare.

b. There was considerable testimony, and argument by counsel, upon the question of the ages of the parties. Mr. and Mrs. Kovacs are in their late forties or early fifties and Mr. and Mrs. Stackhouse are in their late twenties. Counsel for Mr. and Mrs. Stackhouse argue that a very young child should not be placed with foster parents who are over 40 years of age. Our comment upon this contention is that there may be a good reason for such a rule regarding foster parents, and perhaps in cases of adoptive parents (although we do not hold this rule to be inflexible even there), but we do not believe such a rule of necessity should be applied where blood supplies the link and insures the care, love and security. To hold otherwise would be unfair to the many grandparents who are doing excellent jobs of rearing grandchildren. In the instant case the grandmother is 47 years of age and observation by the hearing judge of her demeanor and attitude, including her mental alertness, energetic interest in the child, the fact that she has borne and reared children, leads the court to the conclusion that Mrs. Kovacs is not temperamentally "too elderly" to give to Patricia loving care at least equal to that which can be given by Mrs. Stackhouse.

c. Mr. and Mrs. Stackhouse are the parents of three young children. Mrs. Kovacs has a son who is 17 years of age. The suggestion that Patricia will be happier and better off with the three young children is answered by the evidence that there are cousins of Patricia, near her own age, living in the vicinity of the home of Mrs. Kovacs with whom she can play, as well as children of other families in the same neighborhood. The repeated arguments by counsel for Mr. and Mrs. Stackhouse that the 17 year old son of Mrs. Kovacs is a "delinquent" because he was on probation for speeding and reckless driving of an automobile do not impress the court as having any influence upon the child's

happiness or welfare if living in the same household. Here, again, it appears to the court that there is relatively little or no difference respecting the child's surroundings in either home.

d. The attempt to prove the illiteracy of Mrs. Kovacs, or at least her inferiority to the educational and cultural level of Mr. and Mrs. Stackhouse, was not successful. Actually, the only fact which was proven was that Mrs. Kovacs still retains a Hungarian accent in her speech. The hearing judge could understand her English speech without difficulty and the record shows that she has been a member of the School Board in her community for ten years and has continued to be active in many social and civic services. Mrs. Stackhouse is also of Hungarian descent; and we suggest there is nothing in this background of which any of them need be ashamed. The court cannot hold that Patricia will as a result gain or lose in either home.

To summarize, it appears from all of the evidence that with respect to the factors we have considered the conditions are about equal as to the petitioner and the respondents. This narrows our consideration to two remaining questions of the differences between the petitioner and the respondents, to wit, relationship and religion.

As to the question of relationship, the home, as a basic American institution, has always been given legal protection. Under our laws, there need be no argument that we award custody of young children to their mother, where she is found fit; in the absence of a mother, custody is awarded to the father; because of their close relationship, other things being equal, grandparents are entitled to custody because of inherent common law rights as natural guardians. Commonwealth ex rel. Stevens vs. Shannon, 107 Pa. Superior Ct. 557. In other words, we construe the law of Pennsylvania to follow kinship in our attempt to discover what is for the best interest of a child. In the case before us, the grandmother is closer kin than the aunt.

There is real foundation in reason for this rule, and, in the case at bar, we see it exemplified. When the event happened which took away this child's parents, the family immediately stepped in and ministered to the child's care and welfare. In and around Grand Haven, Michigan, this child's family lives; here, in Delaware County, she has one aunt. We see this child's best interests and happiness protected in the place where her family lives.

As to religion, we realize there is no law which requires us to award custody to a person of the same religious persuasion as the child. However, the Juvenile Court Law and the new Adoption Law carry specific provisions as to this question. We feel that the same law should be followed in custody cases. Here, Patricia was baptized in the Roman Catholic religion. Her father and mother, as well as her grandmother, are Roman Catholics. The Stackhouses are Presbyterians and state that it is their intention to raise this child in that faith.

Finally, we must consider the question of how the Stackhouses secured custody of this child. In discussing this question, we would first make it clear that we are not questioning motives or criticizing the actions of any of the participants. We are well aware of natural reactions resulting from unfortunate events and circumstances. Under stress of emotion we are not to be held to the strictest accountability for our actions. But, nevertheless, there are certain basic principles which must always be preserved.

Here, there was murder. Naturally, the Kuntz family was emotionally affected; this, however, did not give a court the right also to be emotionally affected and to act so precipitously that the rights of parties were not protected. There was nothing in this event that could possibly embarrass this small child either now or as she may grow in this community; she could receive nothing but sympathy, which, understandably, would soon be forgotten with the event. Had this child's parents been killed in an automobile accident, the reaction would have been the same.

And, withal, this child was not made a dependent, which would require any court to act. Any court action, which might have been necessary, should not have taken place without a full and fair hearing, with opportunity to all interested parties to appear and be heard, after due notice. This is basic and fundamental.

In the case before us, Judge Miles held no hearing, talked to the respondents in his chambers, ordered the investigation here in Delaware County of the Stackhouses and found that they were fine people (as, in fact, we know them to be). Then, the Judge signed an order, in which he dismissed the petition filed by Ruth van Duren on April 15, 1953, and, in the same order, with nothing before him, he granted custody of Patricia Ann to the Stackhouses. We realize only too well the sympathetic kindliness which prompted the Stackhouses to call upon the Judge, requesting custody of this child. We believe that the Judge honestly felt that this child would be better off living with the Stackhouses. We understand what a shock it will be to these good people to lose custody of this child.

But, there has been too much thinking, talking and writing lately upon the subject of children being removed from one home and sent to another. The feeling in some quarters is that judges are not qualified to decide these questions; that we know nothing about love, care and security but that there are those who do and they should not be hampered by hearings and court orders. We are too very humble judges who make this decision; we make no claim of omnipotence; we admit that we are legally and not socially trained. But, the laws of Pennsylvania and the laws of Michigan guarantee to our citizenry the right to have all questions of life, liberty and property reviewed and decided in a tribunal dedicated to fairness and impartiality.

The Circuit Court of Ottawa County, Michigan, holding this to be the law, sustained this principle and held the order of Judge Miles of July 6, 1953, awarding custody of

this child to the respondents a nullity. It naturally follows that the respondents are not lawfully in possession of this child. It is incumbent upon this court to give full faith and credit to the decrees of other courts of competent jurisdiction.

For these reasons, therefore, we enter the following

DECREE.

And now, March 11, 1954, it appearing to the court, after testimony and argument, that the interests and welfare of Patricia Ann Kuntz are best protected by awarding her custody to her paternal grandmother, Elizabeth Kovacs, it is ordered, adjudged and decreed that custody of Patricia Ann Kuntz be, and it is hereby awarded to Elizabeth Kovacs; an exception to this action of the court is noted for the respondents.

By THE COURT,

EDWARD LEROY VAN RODEN,
President Judge, Orphans' Court, Specially Presiding.
HENRY G. SWENEY,
President Judge.

OPINION AND ORDER OF SUPERIOR COURT.

COMMONWEALTH EX REL. KUNTZ v. STACKHOUSE, APPELLANT.

Parent and child—Custody of children—Grandmother—Maternal aunt and husband—Religion—Other circumstances—Welfare of child—Appellate review—Act of July 11, 1917, P. L. 817.

1. In child custody cases, the paramount consideration is at all times the welfare of the child, which includes its physical, intellectual, moral, and spiritual well-being, and all other considerations are subordinate.

2. The Act of July 11, 1917, P. L. 817, § 1, requires the Superior Court, on appeal from an order entered in a habeas corpus proceeding involving the custody of children, to exercise its independent judgment and award custody based on its own examination of the record.

3. In a habeas corpus proceeding involving, as between its paternal grandmother and its maternal aunt and her husband, the custody of a child aged two years, in which it appeared that both relatrix and respondents were fit persons to have custody and that both were qualified in a material way to furnish proper facilities for bringing up the child; that relatrix was of the same religion as that in which the deceased parents had baptized the child and respondents were of a different religious persuasion; and that the court below based its decision on religion and relationship and awarded custody to relatrix; it was *Held*, upon consideration of all the circumstances, that the court below had erred and that the welfare of the child would best be served by awarding its custody to respondents.

Argued April 20, 1954. Before RHODES, P. J., HIRT, ROSS, GUNTHER, WRIGHT, WOODSIDE and ERVIN, JJ.

Appeal, No. 161, Oct. T., 1954, from decree of Court of Common Pleas of Delaware County, Nov. T., 1953, No. 229, in case of Commonwealth of Pennsylvania ex rel. Patricia Ann Kuntz, a minor, v. Robert J. Stackhouse et ux. Decree reversed.

Habeas corpus proceeding for custody of minor child. Before VAN RODEN, P. J., specially presiding.

Decree entered awarding custody of child to relatrix. Respondents appealed.

James Conwell Welsh, with him *Edwin E. Lippincott, 2nd, Hall, Hamilton, Wainwright & Welsh* and *Kraft, Lippincott & Donaldson*, for appellants.

John Rogers Carroll, with him *Richard T. McSorley* and *Raymond F. Stopper*, for appellee.

OPINION BY ROSS, J., September 28, 1954:

This habeas corpus proceeding for the custody of Patricia Ann Kuntz, aged two years, was instituted by her paternal grandmother, Mrs. Elizabeth Kovacs, in the Court of Common Pleas of Delaware County. The respondents, Irene and Robert J. Stackhouse, are the maternal aunt and her husband. After hearings, the court below awarded custody to relatrix, and the respondents have appealed to this Court.

The events preceding institution of this proceeding occurred in Michigan. Prior to April 10, 1953 the child's parents, Andrew and Ethel Kuntz, and the child, resided with appellee, then a widow (Mrs. Elizabeth Kuntz), on a farm owned by the latter near the summer resort town of Grand Haven, Michigan. On that date, while appellee was away on a weekend visit, Andrew and Ethel Kuntz were brutally murdered. The child Patricia, then less than eight

months old, was taken across the street to the home of the parents-in-law of her paternal uncle, Frank Kuntz, where she remained until after the funeral of her parents. Subsequently she was removed to Frank Kuntz's home. Appellants, who reside in Delaware County, went to Michigan to attend the funeral and immediately thereafter called on Judge FREDERICK T. MILES of the Probate Court of the district and expressed their desire to bring Patricia to their home in Pennsylvania and rear her as their own. They have three children of their own.

The murder had been a sensational one, and because of its atrocity had attracted front-page headlines, stories and pictures in Michigan newspapers. The Michigan Probate Court, sensing an impending controversy for custody of Patricia, declared her a ward of the court and removed her from the home of Frank Kuntz to a foster home in order to afford the interested parties sufficient time to recuperate from the shock of the terrible tragedy. On July 6, 1953 the Michigan court ordered custody awarded to appellants and they brought her to live with them in their home in Delaware County, where she is presently residing. Appellee appealed, and the Circuit Court of Ottawa County, Michigan, on October 21, 1953, vacated the decree on the basis of noncompliance with Michigan procedural law. Institution of the present proceeding in Pennsylvania followed.

The pertinent statute (Act of July 11, 1917, P. L. 817, sec. 1, 12 PS sec. 1874) requires us on appeal to exercise our independent judgment and award custody based on our own examination of the record. *Leonard v. Leonard*, 173 Pa. Superior Ct. 424, 98 A. 2d 638; *Com. ex rel. Heston v. Heston*, 173 Pa. Superior Ct. 260, 98 A. 2d 477. The paramount consideration in cases of this nature is at all times the welfare of the child, which includes its physical, intellectual, moral and spiritual well-being, and all other considerations are subordinate. *Com. ex rel. Edinger v. Edinger*, 374 Pa. 586, 98 A. 2d 172; *Com. ex rel. Haller v. Hanna*, 168 Pa. Superior Ct. 217, 77 A. 2d 750 (affirmed, 367

Pa. 592, 81 A. 2d 546). Accordingly we have scrutinized the record to determine in the home of which of these contesting relatives the interests of this little girl will better be served.

From our examination of the record we agree with the finding of the learned president judge who tried the case that both appellee and appellants are fit persons to have custody, and that both are qualified in a material way to furnish proper facilities for bringing up the child. Both appear sincerely interested in giving her a good home, attended with loving care. Both parties own their own homes, located in residential areas. Appellee, after the tragedy, sold her farm and moved into a home in Grand Haven, Michigan, which is comfortable and contains ample space to accommodate Patricia. In June 1953 appellee married Louis Kovacs, who testified that he is desirous of having Patricia live with them. Appellee has an income from the estate of her deceased husband and Kovacs is employed at a weekly salary of $75. Appellants reside in a newly developed area of Newtown Square, Delaware County. Appellant husband, a carpenter by trade, built the modern-type home in his spare time. He is now engaged in the contracting business of building with an annual income ranging from $6,000 to $7,500. Although the new home is amply spacious to accommodate the child, should the need arise he would be in position to add extra rooms. Character witnesses appeared for both parties at the hearings to attest to their good reputations and standing in their respective communities. Neither party has questioned the moral fitness of the other to have custody.

The learned trial judge, having found moral fitness and material advantages of both homes in equilibrium, based his decision on religion and relationship. While correctly recognizing that no statute requires that a child's custody be given to one of the same religious creed as that in which the parents baptized the child, he nevertheless found the requirement of the Adoption Law applicable by analogy,

and awarded custody to the grandmother on the basis of such analogy. We think this was error.

Appellee and appellants are of different religious persuasions. Both produced their respective pastors as witnesses to attest to their activity and interest in church affairs. Appellee is an active church worker and appellants, while not as regular in their own church attendance as prior to the time when they had three children to care for, have nonetheless seen to it that their children receive religious training and at the time of the hearings their eldest child had a perfect attendance record there.

We have no concern with committing the child to any particular creed or denomination. Our sole concern is that the home to which we assign it shall provide proper spiritual and material benefits and blessings.

Quite recently (July 13, 1954) we have had occasion to review this problem in *Com. ex rel. Donie v. Ferree,* 175 Pa. Superior Ct. 586, 106 A. 2d 681. In fairness to the learned court below, the *Donie* case had not been decided when its decree in the present case was made. In the *Donie* case the writ issued at the instance of the paternal grandmother and was directed against foster parents in whose home the mother had placed the child and who had been caring for it for approximately three years. The parties were of different religious faiths. The lower court awarded custody to the grandmother, which we reversed on appeal. Speaking through Judge WRIGHT, we stated at pages 590-591: "This [meaning religion] is not a determining factor: Commonwealth ex rel. Kelley v. Kelley, 83 Pa. Superior Ct. 17. Religion is an important matter and should be given consideration, but it does not determine the right to custody: Oelberman Adoption Case, 167 Pa. Superior Ct. 407, 74 A. 2d 790. As was said by President Judge RHODES in that case, 'Unquestionably, the child will be given religious training by respondents, and its home will not be devoid of a religious atmosphere.' And see Commonwealth ex rel. Burke v. Birch, 169 Pa. Superior Ct. 537, 83 A. 2d 426."

The lower court found that the grandmother was closer in kinship than the aunt, and construing the law to require award of custody in accordance with closeness of relationship, ruled in favor of appellee. As authority it cited *Com. ex rel. Stevens v. Shannon,* 107 Pa. Superior Ct. 557, 164 A. 352. This is no longer the law. Because of its similarity to the present case in this respect, we again refer to *Com. ex rel. Donie v. Ferree,* supra, 175 Pa. Superior Ct. 586, 106 A. 2d 681, in which opinion we stated at pages 589-590: "The language relied upon by the lower court was influenced by the Act of June 13, 1836, P. L. 539, which provided that, if a child's parents were deceased, the grandparents were responsible for its support. (Repealed by the Act of June 24, 1937, P. L. 2017, but supplied in pertinent part by the Support Law of 1937, P. L. 2045). In Rumsey's Case, 135 Pa. Superior Ct. 515, 7 A. 2d 43, both of the child's parents were deceased, and we awarded custody to the stepfather as against grandparents. Judge Hirt said, 'If the minor were destitute the law would cast upon the grandparents the duty of his maintenance and the correlative right to custody would follow the duty to maintain: Commonwealth ex rel. Stevens v. Shannon, 107 Pa. Superior Ct. 557, 164 A. 352. But the child is being maintained without charge upon his estate and the grandparents are not seeking custody because of any duty imposed upon them by law . . . To remove the child from a home, with all of its advantages, in which he has lived for years, and from the wholesome environment to which he has made a complete adjustment, could not be done in the interests of the child.' In Commonwealth ex rel. Barnett v. Currie, 165 Pa. Superior Ct. 477, 69 A. 2d 154, decided after the responsibility of grandparents for support had been eliminated, (Act of May 23, 1945, P. L. 864, 62 PS 1973), the child's parents were both deceased. The lower court awarded custody to the stepmother as against the maternal grandmother. In affirming, we distinguished the Shannon case, and rejected appellant's contention that she had an inherent common

law right as natural guardian which was superior to that of a mere stranger." It is clear, therefore, that appellee's status as grandmother per se, under existing law, confers no inherent right to custody of her grandchild.

Appellants are approximately 30 years of age. Appellee and her husband are in their early-to-middle fifties. While many cases could be cited in which the courts have favored the more youthful of the claimants to custody, we, of course, do not believe that the age of appellee, standing by itself, disqualifies her as a proper custodian of her grandchild, although it is a factor to be considered.

As the situation presently exists, Patricia is being brought up with three young cousins, ranging in age from one to seven years. Mrs. Lillian Davis, a case-worker for Delaware County Institution District, appeared as a witness to confirm her impressions of appellants' home as they pertain to custody, which were incorporated in her report of December 24, 1953. This was in accordance with the rule of *Com. ex rel. Oncay v. Oncay,* 153 Pa. Superior Ct. 569, 34 A. 2d 839, cited in *Com. ex rel. Balick v. Balick,* 172 Pa. Superior Ct. 196, 92 A. 2d 703, that in contested child custody cases reports of investigators cannot be received in evidence but the investigators themselves must be produced and examined as witnesses and be subject to cross-examination, just as all other witnesses. Mrs. Davis testified that at the instruction of Judge MILES she had made five visits to appellants' home. Her report, stipulated by counsel for the parties as admissible after cross-examination, describes appellants as a "normal, young, middle-class family with wholesome attitudes toward their children" and that they "seem to have accepted Patricia as their own, and she, in turn has responded favorably to the affection she has obviously received. She appears to be a healthy, well cared for child, as do the other children in the home". Mrs. Davis further stated that appellants' home has "ample play and living area" and ". . . the Stackhouse family is wholesome and the atmosphere of their home conducive to the best welfare of the child".

We mentioned above the sensationalism of the murder of the parents. No stigma attached thereby either to them, who were the innocent victims of a bestial killer, or a fortiori to the child who was deprived of her parents. Fortunately because of her infancy, Patricia will have no memory of the terrible incident. However, others in the locality will remember. It is the common experience of mankind that however kind, solicitous and sympathetic the attitude of one's neighbors may be, if it serves to remind one of a horrible tragedy in family background, it is to be avoided if at all possible. Here Patricia, if she grows up in Pennsylvania, will be hundreds of miles away from the scene of the crime. The possibility of ever-present reminder will be remote. We think it is better, therefore, to have her remain and grow up here, accepted as a member of a good family, with cousins of her own age, than to return to the immediate vicinity of the tragedy and be known as the surviving child of murdered parents, as we fear would happen if her custody were awarded to appellee.

In arriving at our decision we have not been insensitive to the emotional ties which bind appellee to the grandchild who lived for eight months in her home and which ties must of necessity because of distance be severed except for occasional visits. It seems quite natural that the grandmother should want the child to continue living with her. Appellee, who lost her son and daughter-in-law, and appellant wife, who was the only sister of the murdered woman and who came to Michigan to administer to her needs at the time of Patricia's birth, have both suffered immeasurable loss through the fault of no one except that of an insane killer. Decisions in cases such as this are difficult but they must be made, and it is our opinion that the welfare of this little girl will best be served by allowing her to remain with appellants.

Decree reversed and the record is remitted to the court below with direction to enter a decree awarding the custody of Patricia Ann Kuntz to the respondents, Robert J. and Irene Stackhouse.

ORDER OF SUPREME COURT ON PETITION FOR ALLOWANCE OF APPEAL.

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CHARLES H. McKIBBEN
Prothonotary
MAY C. REESE
Deputy Prothonotary
Philadelphia 7

November 3, 1954

John Rogers Carroll, Esq.
Richard T. McSorley, Esq.
631 Land Title Building
Philadelphia 10, Pa.

Re: Commonwealth ex rel Kuntz v. Robert J. Stackhouse, et ux No. 149-A Miscel. Docket No. 10

Dear Sirs:

Please be advised that the Court has entered the following order on your petition for allowance of appeal from the Superior Court to the Supreme Court in the above entitled matter:

"11/1/54
PETITION DENIED.
PER CURIAM."

Very truly yours,
CHARLES H. McKIBBEN,
Prothonotary

CHMcK:esm
cc James Conwell Welsh, Esq.
1710 Locust Street
Philadelphia 3, Pa.
Raymond F. Stopper, Esq.
304 69th Street
Upper Darby, Pa.
Edwin E. Lippincott, II, Esq.
No. 1 Olive Street
Media, Pa.

ORDER OF SUPREME COURT ON PETITION FOR RECONSIDERATION OF PETITION FOR ALLOWANCE OF APPEAL.

Filed November 23, 1954.

PER CURIAM:

There are presented to us petitions for the reconsideration of a petition for the allowance of an appeal from the Superior Court which petition we denied on November 1, 1954.

The Juvenile Court Act of 1933 provides that "The court shall place a child, as far as possible, under the care, guidance and control of persons having the same religious belief as the parents of the child, . . ." The Fiduciaries Act of 1949 provides that "A person of the same religious persuasion as the parents of the minor shall be preferred as guardian of his person." The Adoption Act of 1953 provides that "Whenever possible, the petitioners shall be of the same religious faith as the natural parents of the child to be adopted."

In custody cases, by analogy to the policy thus enunciated in those statutes, the principle is established that the religious faith of the child's parents must be given *very serious consideration* in the placing of the child, nor have we any intention of departing from that principle.

Under the facts of the present case, however, the Superior Court, which is vested with jurisdiction in such matters, determined that a paramount and imperative regard for the welfare of the child required that it be removed from the locality where its parents were murdered. Finding in this exercise of its judgment no violation of the principle above stated we refused the petition for the allowance of an appeal.

The petitions for reconsideration are accordingly denied.

FILED
MAR 15 1955
HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

October Term, 1954.

No. 583.

COMMONWEALTH OF PENNSYLVANIA ex el. PATRICIA ANN KUNTZ, a Minor,

Petitioner,

v.

ROBERT J. STACKHOUSE and IRENE STACKHOUSE, His Wife,

Respondent.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

JAMES CONWELL WELSH,
1710 Locust Street,
Philadelphia 3, Pa.,

EDWIN E. LIPPINCOTT, II,
1 Olive Street,
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Attorneys for Respondent.

International, 236 Chestnut St., Phila. 6, Pa.

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COUNTER-STATEMENT OF QUESTION PRESENTED.

Should custody of an orphan girl-child, two and one-half years of age, who has been living in Pennsylvania with her twenty-eight year old aunt and uncle for nearly two years, admittedly excellent parents, and with first cousins her own age, be awarded to her Michigan paternal grandmother and her recently married husband, a non-citizen with a poor employment record and no experience with children, both of whom are in their early or middle fifties and barely able to speak the English language, there to be raised with a seventeen year old uncle who is on probation, as an object of curiosity in the small town where her parents were atrociously murdered, solely because the child was baptized Catholic and her aunt and uncle are Presbyterian and will raise her as such?

(Answered in the negative by the Superior Court and Supreme Court of Pennsylvania.)

CONSTITUTIONAL PROVISION INVOLVED.

None.

COUNTER-STATEMENT OF THE CASE.

Patricia Ann Kuntz was born August 22, 1952. Her parents were viciously murdered on April 10, 1953. The atrocious crime attracted widespread attention not only in the small town of Grand Haven, Michigan, but in a surrounding area of several hundred miles.

Immediately after her parents' deaths Patricia Ann was taken by the local sheriff to a house across the street from the scene of the murder where she remained until and the funeral. Immediately following the funeral, Mr. and Mrs. Robert J. Stackhouse who reside in Delaware County, Pennsylvania, appeared before the local probate judge of Grand Haven and made formal application for the custody of the child. Mrs. Stackhouse is the only sister of Patricia Ann's deceased mother.

On April 15, 1953, a petition was presented to the Ottawa County Probate Court in Michigan by the couple's agent wherein it was requested that the court take jurisdiction of Patricia Ann due to the circumstances set forth above. After preliminary inquiry the court took formal jurisdiction.

Thereafter because of the great hysteria and emotional upset then apparent as a result of the tragedy and the attending requests of the maternal and paternal grandparents,, as well as the aunt, Mrs. Stackhouse, Patricia Ann was placed in a proper, state licensed, foster home where she remained until July 6, 1953. For a period of three weeks no one was permitted to visit the child, but after that time visiting privileges were accorded all interested parties.

As a result of the requests by Mr. and Mrs. Stackhouse for custody of Patricia Ann, the probate judge caused a extensive report and investigation be made concerning them. This investigation was made and a report dated May 29, 1953, was sent to the probate judge by the Delaware County, Pennsylvania, Child Care Service and by other persons in Pennsylvania.

On June 15, 1953, barely two months after the atrocious murder of her son, the appellant herein, Mrs. Kovacs, was remarried. On her wedding day she stopped in to see the local probate judge with her new husband. She was at that time represented by counsel. The probate judge informed them that he was going to award Patricia to Mr. and Mrs. Stackhouse (N. T. 163). On July 6, 1953, the child was awarded to Mr. and Mrs. Stackhouse and a formal decree was issued by the court making such award. Patricia was taken by them to their home in Broomall, Pennsylvania, and later to their new home in Newtown Township, Delaware County, Pennsylvania, where she has since resided. The decree awarding custody to Mr. and Mrs. Stackhouse recited that it was made after full investigation and that said award was to be under the supervision of the Pennsylvania Child Care Service.

Subsequently a writ of habeas corpus was filed in the Delaware County, Pennsylvania, Common Pleas court and hearings were had thereon on December 28 and 29, 1953 and January 7, 1954.

The evidence indicated (and the lower court so found) that the homes of both Mrs. Kovacs and Mr. and Mrs. Stackhouse were adequate and desirable and that both were financially responsible. Mrs. Kovacs, the paternal grandmother, is fifty-two or fifty-three years of age and her new husband is fifty-four or fifty-five. Both are Catholics. Although the record does not clearly indicate it, both Mrs. Kovacs and her husband speak English poorly. Mrs. Kovacs and her husband spent a great part of their lives in Hungary. Mr. Kovacs has changed jobs frequently and may properly be described as an itinerant worker. Mrs. Kovacs' son, the seventeen year old uncle of the child, is on probation.

Mrs. Stackhouse was the only sister of Patricia Ann's deceased mother. She is an attractive, intelligent, high-school graduate, well spoken and a capable mother. Her husband is a veteran of World War II, well-spoken, clean-

cut and a capable father. Both are twenty-eight years of age and Presbyterians. Mr. Stackhouse is a building contractor and earns approximately $7,500 per year. They have three other children ranging in age from eight months to six and a half years and recognized by Patricia as her brothers and sisters. She calls Mr. and Mrs. Stackhouse mommy and daddy. Mrs. Kovacs in her petition to the Ottawa County Michigan Probate Court requesting custody of Patricia pleaded in the alternative to the effect that if she could not raise Patricia she would GIVE *the child to her other son, Frank. Her son, Frank, is raising his children, Mrs. Kovacs's other grandchildren, as Protestants.*

The Ottawa County, Michigan, probate court awarded custody of Patricia to Mr. and Mrs. Stackhouse in Pennsylvania. The Common Pleas Court of Delaware County, Pennsylvania, awarded custody to Mrs. Kovacs in Michigan. An appeal was taken in the Superior Court of Pennsylvania and Patricia was awarded to Mr. and Mrs. Stackhouse. Mrs. Kovacs sought an appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania. On November 1, 1954, the petition for appeal was denied. Subsequently a petition for reconsideration of the petition for allowance of appeal was filed with the Supreme Court of Pennsylvania and it was again denied.

ARGUMENT.

The universal rule in determining the custody of minor children is that the best interests and permanent welfare of the child must control. The Superior Court and Supreme Court of Pennsylvania have confirmed this on many occasions.

> "The guiding star for the court in coming to a conclusion in cases of this character is the welfare of the child. To this the rights of parents and all other considerations are subordinate. *Commonwealth ex rel. v. Daven,* 298 Pa. 416; *Commonwealth ex rel. v. Faxstein,* 84 Pa. Superior Ct. 243; *46 Corpus Juris,* 1235 Section 15(2)."

Mrs. Kovacs, the petitioner, has at various times in these proceedings taken the most inconsistent positions. In her application for custody before the Ottawa County court in Michigan she originally proposed that if she could not handle the child she would give the child to her son Frank. In her appeal to the circuit court in Michigan she formally pleaded that the child be awarded to her *or to her son Frank.* The record discloses that her son Frank and his wife are members of the Christian Reformed Church and quite obviously the child would not be brought up in the faith in which she was baptized. It is submitted, therefore, that the issue attempted to be raised before this court is not brought in good faith.

Pennsylvania statutes regarding custody of minor children and religion are similar to those in many other jurisdictions. A recent case before the court is the petition for certiorari in the case of *Rouben Goldman and Sylvia Goldman, Petitioners v. John M. Fogarty, Guardian ad Litem,* Supreme Court of the United States, October Term, 1954 No. 494. This case is cited on page 12 of the appel-

lants' petition for certiorari. The Goldman petition, supra, was recently denied by this court.

The Supreme Court of the State of Pennsylvania in denying an application for reconsideration of the petition for allowance of appeal, which opinion is quoted on page 35 of petitioners' petition, said,

> "The Juvenile Court Act of 1933 provides that 'The court shall place a child, as far as possible, under the care, guidance and control of persons having the same religious belief as the parents of the child, . . .' The Fiduciaries Act of 1949 provides that 'A person of the same religious persuasion as the parents of the minor shall be preferred as guardian of his person.' The Adoption Act of 1953 provides that 'Whenever possible, the petitioners shall be of the same religious faith as the natural parents of the child to be adopted.'
>
> "In custody cases, by analogy to the policy thus enunciated in those statutes, the principle is established that the religious faith of the child's parents must be given *very serious consideration* in the placing of the child, nor have we any intention of departing from that principle."

The Superior Court and Supreme Court of Pennsylvania have given and continue to give in each such case very serious consideration to the question of religious preference. It has wisely refrained from enunciating any hard and fast rule, but on the contrary has considered each case on its own individual merits.

The award of custody in this case to Mr. and Mrs. Stackhouse is devoid of any judicial direction that Patricia Ann be brought up in any particular faith. In this matter before the court Patricia Ann's parents are dead. Her mother was for twenty-one years of her life a Presbyterian. She became a Catholic to get married. Patricia Ann was baptized a Catholic. In this she had no choice. Her parents now being dead, the child must be brought up by

someone. Mrs. Stackhouse was very close to her sister, Patricia Ann's mother. Certainly the award of custody of this little girl to her aunt is one which keeps her closely held to the family.

The impartial report of the Delaware County Child Care Service, a completely impartial agency of the Delaware County Common Pleas Court, is important. That report states inter alia:

> "There is a warm, comfortable feeling about the entire family. The parents were very much together as they discussed their interest in Patricia Ann. Their relationship to their own children seems affectionate and accepting. During our contact in the home the children and their playmates were in and out of the house in a way that suggested normal freedom. There did not seem to be any sharp division of responsibility. When the younger child needed adult help, he went easily to either parent and received whatever attention was needed.
>
> "The neighborhood in which they live is composed largely of families who seem to know each other well and both the children and their parents are on actively good terms with their neighbors. At the time of our visit, Mr. Stackhouse was helping his next door neighbor while the wives were helping the children with a game they were playing . . .
>
> "As the couple spoke of the close ties between the two families they brought out snap-shots taken at the time Patricia Ann was born and later at vacation, showing the various members of the family with Patricia Ann. It seems that at the time of Mrs. Kuntz's confinement it had been arranged that Mrs. Stackhouse would visit, so she was therefore notified when Patricia Ann was expected. The family seemed genuinely interested in Patricia Ann and concerned for her welfare. They are eagerly looking forward to having her become

a part of their family. Their daughter, JoAnn has expressed an interest in having Patricia Ann join their family. They are not anticipating any jealousy on her part but expect that Dale, because of his age, might feel displaced by a younger child but they are prepared to meet this in the same way they would if another child had been born to them. They seem to have the capacity for giving affection to two young children so that Dale should be able to adjust himself to a younger child when he finds that sharing his parents does not deprive him of needed attention . . .

"Based on our observations of the family, we feel free to recommend their home for Patricia Ann without reservation. They seem genuinely interested in the child and concerned for her well being. It would be a natural home for her and one in which we believe she would receive good and loving care. For a young couple, Mr. and Mrs. Stackhouse are comfortable financially and the support of this child should not present any problem . . .

"On our first visit to the family we found Patricia quite shy and inclined to stay very close to Mrs. Stackhouse, for whom she had apparently formed an early attachment. Contrary to our expectations, Dale had accepted Patricia without signs of jealousy, but Joanne had seemed to show some signs of hesitancy. The parents handled this reaction quite well and by the time of our last contact when the new baby was born and the family had moved into their new home in Newtown Square, the children seemed quite secure and Patricia had apparently found her place in the family.

"Our later contacts have served to confirm our earlier observations. The Stackhouse family seems to be a normal, young, middle-class family with wholesome attitudes toward their children. They have enthusiastically shared their plans and their fears with

our agency. They seem to have accepted Patricia as their own, and she, in turn, has responded favorably to the affection she has obviously received. She appears to be a healthy, well cared for child, as do the other children in the home.

"The cooperation between the parents continue to be apparent throughout our contacts as they have discussed their many plans for the future. Mr. Stackhouse seems to be an energetic, hard-working, young man who recently built a new home in his spare time while continuing his work as a building contractor. Their new home is more spacious, with ample play and living area. There are three bedrooms, two bathrooms, living room, dining room, laundry, basement and two car garage.

"From our observation the Stackhouse family is wholesome and the atmosphere of their home conducive to the best welfare of a child."

The brief for appellants filed in the Superior Court of Pennsylvania in this case sets forth the many considerations relied upon to show that the best welfare of Patricia Ann is best served by having her custody awarded to her maternal aunt and uncle.

In conclusion it is submitted that there is no question in this case regarding the freedom of religion as granted by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

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